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POSTHUMOUSLY CONCEIVED CHILDREN: INTESTATE SUCCESSION AND DEPENDANTS RELIEF;

THE INTESTATE SUCCESSION ACT: SECTIONS 1(3), 6(1), 4(5), 4(6) AND 5

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CHAPTER 1

INTRODUCTION

A. SCOPE OF REPORT

This report considers three matters respecting intestate succession, two being amendments to existing sections of *The Intestate Succession Act* and one being the question whether posthumously conceived children should be eligible to inherit from and through a deceased parent who dies intestate. Also, in regard to posthumously conceived children there is the concomitant issue of dependants relief.

When this report is implemented, in regard to posthumously conceived children there may be issues for consideration respecting the definition of "child" in other legislation relating to death benefits.

B. ACKNOWLEDGEMENTS

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CHAPTER 2

INTESTATE SUCCESSION RIGHTS FOR POSTHUMOUSLY CONCEIVED CHILDREN

A. INTRODUCTION

All human beings begin from fertilization of a female gamete (egg) by a male gamete (sperm). Because of advances in the science of assisted human reproduction, it is now possible for that fertilization to occur after the death of at least one biological parent of resulting live – born children. This report discusses the question of whether or not such posthumously conceived children should be eligible to inherit from that deceased parent upon the latter's intestacy, and through that deceased parent, from the intestacy of another biological relative.[1]

B. ASSISTED REPRODUCTION TECHNOLOGIES (ARTs)[2]

Whether natural or assisted fertilization occurs, the chromosomes of each gamete unite into a single cell with 48 chromosomes, a process that takes several hours. The cell is a zygote and must develop into two, four and eight cells over about three days to reach the blastocyst or embryo stage.

The natural method of fertilization is through heterosexual intercourse. For centuries (if not millennia), however, it has been known that this is not the only way.

1. Artificial Insemination (AI)

This involves the introduction (*via* catheter) of sperm into a woman's body. Here, fertilization takes place inside the body. The resulting zygote may develop into an embryo which must then implant itself onto the uterine wall if it is to develop to term. AI is the oldest known, most commonly used and most successful ART.[3] The sperm may be that of the woman's husband or common-law partner (AIH), or that of a donor, usually anonymous (AID).

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[1] This report does not involve inheritance through wills, which depends upon judicial interpretation of the testator's intentions. Intestacy is governed by a statutory regime of irrebuttably presumed intentions of deceased persons: *The Intestate Succession Act*, C.C.S.M. c. I85.

[2] Descriptions of ARTs may be found in: Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters* (1985) and Ellen J. Garside, "Posthumous Progeny: A Proposed Resolution to the Dilemma of the Posthumously Conceived Child" 41 Loy. L. Rev. 713 (1995-96).

[3] Used for ages in animal husbandry, AI was first recorded as successfully resulting in a human birth in 1770, in England: Garside, *ibid* at 715, n. 16.

2. *In Vitro* Fertilization (IVF)

In this method, the gametes are united outside the body, in a petri dish in a laboratory or clinic. IVF is a much more recent development than AI, the first human success having occurred in 1978, in England, with the birth of Louise Brown. In IVF, when the zygote reaches the embryo stage, it may be implanted into the uterus. The eggs used may have been those of the man's wife or common-law partner, or may have been donor eggs.

3. GIFT and ZIFT

These are variations on AI and IVF. Gamete Intrafallopian Transfer (GIFT) involves the injection of gametes into the fallopian tubes *via* laparoscope. In this case, fertilization occurs inside the body. Zygote Intrafallopian Transfer (ZIFT) is similar to GIFT, but a zygote is injected. Here, fertilization has already taken place outside the body, *in vitro*.

4. Surrogacy

A surrogate mother may carry a fetus to term and give birth on behalf of another. She might have been impregnated through any of the ARTs. It is possible that egg donation will have been from the woman who intends to receive the child.

5. Cryopreservation

The two basic ARTs (and their varations) are enhanced by the use of cryopreservation, a technique of freezing reproductive material for later use. In most cases, it is the sperm that has been cryopreserved, but eggs and embryos may be frozen too. It was discovered in 1949 that sperm could be frozen and remain viable for long periods of time.[4] It is known today that this time period is as long as ten years and that it may be much longer. The first successful posthumous use in AI of frozen sperm took place in Australia, in 1977.[5] The first successful birth resulting from a frozen embryo occurred in the United States in 1983.[6]

Cryopreservation makes posthumous conception possible and, therefore, opens the door to the issue raised in this report.

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[4] Summer A. Johnson, "Chapter 775: Babies with Bucks – Posthumously Conceived Children Receive Inheritance Rights" 36 McGeorge L. Rev. 926 (2005).

[5] Joshua Greenfield, "Dad Was Born a Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance, With a Focus on the Rule Against Perpetuities" 8 Minn. J.L. Sci. & Tech. 277 (2007), n. 5.

[6] Julie E. Goodwin, "Not All Children are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children" 4 Conn. Pub. Int. L.J. 234 (2004-05) at 212, n. 18.

C. AN EXAMPLE CASE

In each of the ARTs, it is possible for post-mortem conception to occur, no matter which biological parent has died, but in the case of a deceased mother, a surrogate would be necessary. The greater likelihood is that it will have been the father who has died and whose cryopreserved sperm or embryos have then been used by his spouse or common-law partner to achieve a pregnancy. For convenience, this report will refer to such a scenario, keeping in mind that there could be other situations.

> Suppose: A man and a woman marry and have two children. The woman dies. When the children are adults, the man marries a woman with no children. The man is diagnosed with cancer requiring treatment by chemotherapy which may render him sterile. He either banks sperm which is cryopreserved, or his sperm is used in an IVF procedure to create embryos which are cryopreserved. He undergoes the therapy but dies intestate in a car crash several months later. After about a year, his widow decides to make use of the cryopreserved material in order to give birth to her late husband's child. This child is born two years after the man's death.

D. MANITOBA LAW OF INTESTACY

Intestate succession in Manitoba is governed by *The Intestate Succession Act*.[7]

Subsection 1(1) of the Act defines "issue" as "all lineal descendants of a person through all generations". A posthumously conceived child, being biologically related to the person, might seem to qualify as a "lineal descendant", but the Act states further,

> 1(3) Kindred of the intestate conceived before and born alive after the death of the intestate inherit as if they had been born in the lifetime of the intestate.

No mention is made of those who might be both conceived and born after the death of the intestate. The Act also makes reference to "surviving issue" in other sections.

Two American cases, in related matters, raised arguments on behalf of posthumously conceived children that the wording of their respective state succession Acts, akin to Manitoba's, could be interpreted to include such children as "issue" or as "surviving issue".

In *Finley v. Astrue*[8] a widow claimed that her child, the result of IVF, should be eligible in her husband's hypothetical[9] intestacy as having been conceived before her husband's death but born after his death. Her argument equated conception with fertilization, which had happened

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[7] C.C.S.M. c. I85.

[8] 372 Ark. 103 (Sup. Ct. 2008) [*Finley*].

[9] Why the intestacy was "hypothetical" in this case and in the case next following, *infra* note 10, is explained in Part E1, below.

in a petri dish, while her husband was still alive. The frozen embryos were thawed and implanted in her uterus eleven months after his death. The child was born in March 2003, but the father had died in July 2001. The court concluded that the Arkansas state legislature, in enacting its intestate succession statute (including a section almost identical to Manitoba's subsection 1(3)) in 1969, could not have intended the word "conceived" to include the process of IVF, which was then unknown. Conception was considered to have occurred at the embryo implantation stage. The court said that to define conception as argued, and thus to include posthumously conceived children in intestacies, would implicate public policy concerns best left to the legislature.

It could also be observed that, if the requested interpretation had been granted, posthumously conceived children born through IVF would be included in intestacies, but not those born of AI, surely an undesireable difference of treatment by the law.

In *Khabbaz v. Commissioner, Social Security Administration*[10] it was argued that a posthumously conceived child, born two years after her father's death, and conceived through AI with his banked sperm, was "surviving issue" in his hypothetical intestacy. The New Hampshire court found that the plain meaning of the word "surviving" is "remaining alive or in existence". For the child to remain alive or in existence after her father's death, she would necessarily have had to be "alive" or "in existence" at the time of his death. She was neither.

Clearly, these cases would not be binding on a Manitoba court, but it seems unlikely that different decisions would be made on these definitional questions. It would appear, therefore, that posthumously conceived children, as a class of biological relatives, are not eligible to inherit by Manitoba's intestacy law.

Under *The Intestate Succession Act*, the issue raised in this report could arise, *inter alia*, if subsection 2(3) were involved:

> If an intestate dies leaving a surviving spouse or common-law partner and issue, and one or more of the issue are not also issue of the surviving spouse or common-law partner, the share of the surviving spouse or common-law partner is
>
> > (a) $50,000., or one-half of the intestate estate, whichever is greater; and
> > (b) one-half of any remainder of the intestate estate after allocation of the share provided by clause (a).

In the Example Case,[11] the two children from the man's first marriage are not also the issue of his surviving spouse. The "non-spousal" share of the estate would be distributed according to section 4, in particular by subsection 4(2):

> If there is surviving issue, the estate goes to the issue of the intestate to be distributed per capita at each generation as provided in section 5.

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[10] 930 A.2d 1180 (N.H. Sup. Ct. 2007) [*Khabbaz*].

[11] Part C, above.

Subsection 5(1) states:

> When a distribution is to be made to the issue of a person, the estate or the part of the estate which is to be so distributed shall be divided into as many shares as there are
>
> (a) surviving successors in the nearest degree of kinship to the intestate which contains any surviving successors; and,
> (b) deceased persons in the same degree who left issue surviving the intestate.

Thus, the two children of the man's first marriage would share the "non-spousal" part of the estate equally.

But, if the posthumously conceived child were to be included, then the three children of the deceased would share equally with one another. Obviously, the shares of the two children of the first marriage would be reduced from halves to thirds. In the Example Case, the two children of the deceased man are adults. As adults, they are more likely to defend against an action on behalf of a posthumously conceived child who wishes to share in the estate, because their interests are at odds with the interest of the posthumously conceived child. They would want a greater, rather than a lesser, share. If they are minors, in the scenario, they may be absorbed into the second marriage, as a blended family, and may not so likely have personal stakes in the intestacy different from their half sibling, the posthumously conceived child.[12]

The question is also raised of whether a posthumously conceived child might inherit *through* a deceased parent from some other intestate biological relative.

Suppose, that in the Example Case, the two children of the first marriage have neither spouses nor common-law partners and no issue. One of them dies intestate in the same car crash that killed their father.

By subsection 6(1) of *The Intestate Succession Act*, each of the father and the deceased child would be deemed to have predeceased the other:

> A person who fails to survive the intestate for 15 days, excluding the day of death of the intestate and of the person, shall be treated as if he or she had predeceased the intestate for purposes of succession under this Act.

The father's estate would be distributed, in the shares explained above, to his surviving spouse and to the surviving child of his first marriage. The deceased child's estate would go to the surviving sibling by subsection 4(4):

---

[12] Unlike Manitoba, in most, if not all other, Canadian provinces and territories, if an intestate is survived by a spouse or common-law partner and a child or children of the deceased and the surviving spouse or common-law partner, the spouse or common-law partner and child or children share the estate. Thus, while the issue of intestate succession rights for posthumously conceived children and their issue is likely to occur more often elsewhere in Canada than Manitoba, it will surely arise in Manitoba.

> If there is no surviving issue or parent, the estate goes to the issue of the parents of the intestate or either of them to be distributed per capita at each generation as provided in section 5.

But, if the posthumously conceived child were to be included, then the father's estate would go to the surviving spouse with the "non-spousal" part shared equally by the surviving child of the first marriage and the posthumously conceived child. The estate of the deceased child of the first marriage would be shared equally by the surviving sibling and the posthumously conceived child. Subsection 1(4) treats kindred of the half-blood equally with kindred of the whole blood of the same degree of kinship to the intestate.

It is clear that if posthumously conceived children were to be included in the intestate succession regime, the shares of other heirs would be reduced. Also, since cryopreservation keeps reproductive material viable for many years, the administration of intestacies could be delayed for an unacceptable amount of time, pending use of the material and a live birth resulting from an ART procedure.

E. OTHER JURISDICTIONS

Considering experience and recommendations from other jurisdictions helps to focus on the concerns arising from the question posed in this report. It is interesting and informative to observe the various responses to these concerns.

1. American Case Law

In the United States, a federal Social Security program provides benefits to dependent children of insured workers who die while employed.[13] The legislation does not include a definition of "child" or "children", but directs that question, should it arise, to be determined by the intestate succession laws of the state where the deceased worker was domiciled at date of death.[14] Some cases have arisen where applicants for these benefits were posthumously conceived children. Relevant state courts have had references made to them under this benefits scheme to determine whether such children would qualify according to their intestate succession regimes and so be eligible for Social Security benefits. The cases, therefore, do not *per se* concern intestacies but are decided hypothetically, by application to their facts of the state's intestate succession legislation.[15] The following cases are of interest because they raise arguments pro and con and illustrate common fact situations in this matter.

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[13] "Child's insurance benefits", 42 U.S.C. § 402(d).

[14] 42 U.S.C. § 416(h)(2)(A) provides that "In determining whether an applicant is the child... of [an] insured individual..., the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property... by the courts of the State in which [the insured] was domiciled at the time of his death...".

[15] *Finley*, *supra* note 8 and *Khabbaz*, *supra* note 10, were cases of this sort as were all the other cases referred to in this section of the report.

The most recent of the cases have denied eligibility. In *Finley v. Astrue*[16] and *Khabbaz v. Commissioner, Social Security Administration*,[17] posthumously conceived children were considered incapable of being brought within the wording of their respective statutory intestacy schemes: Arkansas and New Hampshire. Both of these states have statutes very like Manitoba's.[18] The courts declined to make more expansive interpretations in favour of giving posthumously conceived children intestacy rights, and both urged their respective state legislators to act on the matter.[19]

Other American cases have found in favour of posthumously conceived children's intestacy rights.[20]

In re Estate of Kolacy[21] was a claim on behalf of twins born more than eighteen months post-mortem of their father through IVF, using his banked sperm. The New Jersey intestacy scheme included issue conceived before the decedent's death but born after,[22] (as does Manitoba's). The court noted that the section had been added to the statute in 1877 and, clearly, the legislature then could not have contemplated issue conceived after death. Since posthumous conception had never been ruled out (once it became known), the court thought that policy ought to govern the question; to wit, state interest in protecting and expanding the rights of all children, including intestate succession rights. The twins were found eligible for Social Security benefits.

Kolacy, however, cannot be taken very far. The court also observed that intestacy rights of posthumously conceived children should not unfairly intrude upon the rights of other claimants in an intestacy, nor cause serious problems with orderly administration of estates. The deceased had left no estate and so, in this case, there were no others whose claims had to be balanced against those of the twins, and no concerns about the orderly administration of the estate. The court, in *obiter*, said that the solution to the difficulty raised by allowing posthumously conceived children to share in intestacies could be either to award them shares only from the as-yet-undistributed portion of the estate, if any, at the time they were born, or for

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[16] *Supra* note 8.

[17] *Supra* note 10.

[18] See the discussion of these two cases in Part D, above.

[19] *Stephen v. Commissioner of Social Security*, 386 F. Supp.2d 1257 (M.D. Fla. 2005) also decided against a posthumously conceived child, but on the basis of specific Florida legislation excluding posthumously conceived children from claims against estates unless provided for in the deceased's will: Fla. Stat. Ann. § 742.17(4). See Part E 4, below.

[20] Two of these cases are not useful. *Hart v. Shalala*, No. 94-3944 (E.D. La. 1994) became moot in 1996, when the Social Security Administrator settled the claim before trial in favour of the child who had been posthumously conceived through GIFT three months after her father's death. *Gillett-Netting v.Barnhart*, 371 F.3d 593 (9th Cir. 2004) featured twins born eighteen months after their father's death. IVF was used with his frozen sperm. A Federal Court decided, on a reading of the Social Security legislation, that biological children of married Arizona parents were to be considered dependent children for the purpose of receiving Social Security benefits. Arizona state intestacy law was, therefore, never reached in this decision.

[21] 753 A.2d 1257 (N.J. Sup. Ct. Ch. Div. 2000).

[22] The section provided that "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent" N.J. Stat. Ann § 3B: 5-8, in *Kolacy*, *ibid.*

the legislature to set a precise time limit for them to come into being after the death, so as to freeze administration of the estate during that time to allow them shares in the whole estate.

A very useful case for its thoughtful analysis is *Woodward v. Commissioner of Social Security*.[23] Twins were born two years after the death of their father, by means of AI with his banked sperm. The Massachusetts Supreme Judicial Court dealt with their claim for Social Security benefits.[24]

The court noted the extreme positions of the two sides in the case; the twins' representative argued that once a biological link was proved, posthumously conceived children should always enjoy intestacy rights, while the Social Security stance was that such children should never be entitled. To the court, neither position was tenable.

The relevant section of the state intestacy law merely said, "[p]osthumous children shall be considered as living at the death of their parent"[25] and had stood thus for 165 years. It made no distinction between posthumous children conceived before the death and those conceived after. The court, therefore, felt unconstrained by the wording of the statute,[26] and proceeded to conclude that posthumously conceived children should have intestacy rights, albeit with limitations. Inclusion could not be automatic, based merely upon biological link, although proof of that connection would be the first requirement of a claimant. This would be to prevent fraudulent claims against an estate because the purpose of intestacy legislation is to pass wealth to spouses, common-law partners, and blood relations.

The court stated that there are three important concerns to consider and balance: the best interests of children, the orderly administration of estates and the reproductive rights of genetic parents.

As to the first of these concerns, the court noted that ARTs have been widely known for decades, and that the Massachusetts legislature had not acted in that time to clarify that posthumously conceived children were to be excluded from intestate succession, and indeed, had otherwise supported the practice of ART. The court refused to impute to the legislature the intention to encourage ARTs while extending fewer rights and protections to the fruits of those technologies, as a class of children. "Posthumously conceived children may not come into the world the way the majority of children do. But they are children nonetheless".[27] They should have, as far as possible, the same rights and protections as children conceived pre-mortem.

Secondly, the rights of posthumously conceived children must be balanced against those of other heirs who wish for certainty through prompt and accurate administration of intestacies.

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[23] 760 N.E.2d 257 (Mass. Sup. Jud. Ct. 2002) [*Woodward*].

[24] At the outset, the court said that there was no principled reason that its conclusions would not apply equally to posthumously conceived children born from a deceased female's gametes.

[25] M.G.L. c. 190 § 8.

[26] *Cf. Finley*, *supra* note 8 and *Khabbaz*, *supra* note 10.

[27] *Supra* note 23 at 266.

In part, their interests are served by requiring proof of genetic connection of the claimant to the intestate. The court thought that this would not be burdensome, given that modern DNA testing produces accurate and reliable determinations. Obviously, the interests of other heirs also implicate the question of timeliness. In *Woodward*, however, the Social Security Administration indicated that the question of time limit need not be addressed because of a change in federal regulations.[28] Even though not required to make such a ruling, the court said that a time limit would be required to balance the wishes of claimants for prompt distribution against the needs of a survivor for a proper grieving period, before making a decision, and for time to attempt and achieve pregnancy through ART.[29]

Thirdly, it was recognized that "individuals have a protected right to control the use of their gametes".[30] It would be essential for a posthumously conceived child to present evidence of clear and unequivocal consent by the deceased parent to post-mortem use of gametic material for reproduction, and to the support of any resulting child(ren). Merely for a person to have deposited reproductive material would be insufficient proof of intention regarding posthumous conception, because the action could have been taken with a lifetime contingency in mind, or circumstances could have changed after the deposit. The court felt it was not required to specify what proof would be sufficient. That question, and the one of time limitation, were left to an appropriate case, should one arise.

The court ended its decision with a call to the legislature to address the question raised by the case. The issues "cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehensive response reflecting the considered will of the people."[31]

2. The United Kingdom

The *Human Fertilisation and Embryology (Deceased Fathers) Act 2003*[32] amended the *Human Fertilisation and Embryology Act 1990*,[33] which had stated in subsection 28(6):

---

[28] There is a difference between intestacies and a government benefits program. The latter is "always" there and payments can be made to eligible beneficiaries long after an event, without holding up anyone else's share. As well, the success of one applicant in achieving eligibility does not come at the cost of any other. An estate is finite and a successful posthumously conceived child's share will reduce the shares of claimants of the same degree of kinship, and may delay administration of the estate.

[29] Often, several attempts over time must be made before the ART procedure succeeds and then, of course, the pregnancy must be carried to term and the child born alive. The widow in *Woodward*, *supra* note 23, had made one unsuccessful attempt after her husband's death before becoming pregnant.

[30] *Supra* note 23 at 269.

[31] *Ibid.* at 272.

[32] 2003, c. 24.

[33] 1990, c. 37.

Where --- ...

> (b) the sperm of a man, or any embryo the creation of which was brought about with his sperm, was used after his death,
>
> he is not to be treated as the father of the child.

The amendment allowed for registration of such a man as the father of the child in an official registry of vital statistics, but went on to say:

> ... the deceased man --- ...
>
> (b) is to be treated in law as not being the father of the child for any other purpose.[34]

Thus, posthumously conceived children are excluded from their father's intestacy.

Section 27 of the 1990 Act[35] makes it clear that the mother of a child is the woman who "is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child."[36] A child posthumously conceived from a donor woman's eggs or embryos would, thus, have no inheritance rights in the donor's intestacy. The point is driven home by subsection 29(1) of the same Act which states that the mother, as defined in section 27, is the mother of the child, "for all purposes".[37]

3. New South Wales, Australia

The New South Wales Law Reform Commission has recommended exclusion of posthumously conceived children from intestate succession rights.[38] Its report, in recommendation 25, states, "The model laws should make it clear that persons born after the death of the intestate must have been in the uterus of their mother before the death of the intestate in order to gain any entitlement on intestacy."[39] The reasoning is that including posthumously conceived children could lead to "delays and complexity" in the administration of estates, "especially when the number of people in a generation have to be determined for the purposes of *per stirpes* distribution. The problem could be compounded further when dealing

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[34] Subsection 29(3B) of the *Human Fertilisation and Embryology Act 1990*, *ibid.*, created by subsection 1(2) of the *Human Fertilisation and Embryology (Deceased Fathers) Act 2003*, *supra* note 32.

[35] *Supra* note 33.

[36] *Ibid.*; this is absent the adoption of the child.

[37] *Ibid.*

[38] NSW Law Reform Commission, *Uniform succession laws: intestacy* (Report #116, April 2007).

[39] *Ibid.* at 129.

with collateral kin of the intestate."[40] The "simple approach of disregarding"[41] these children for the purposes of intestate succession was preferred.

4. Florida

A child conceived post-mortem is able to inherit from a deceased parent only if the parent provided for the child by will. The state intestacy law specifically addresses posthumously conceived children and excludes them:

> A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will.[42]

Stephen v. Commissioner of Social Security[43] applied this law in a case where, the day after a man's death, in 1997, his widow had his sperm extracted from his corpse and cryopreserved. Eight months later, in 1998, she began IVF procedures which were unsuccessful until, finally, she gave birth to the man's child in 2001. The child was not eligible for Social Security benefits by Florida state intestacy law.

5. Other American States[44]

For the most part, the states have parentage enactments determining the parentage of children, should the question arise, for any purpose. The states may have included parentage definitions in their intestacy statutes, or may not, leaving their two enactments to be read together in cases of intestacy. Parentage Acts, by inference, will determine intestacy rights in cases where the intestacy codes do not specifically do so.

(a) Intestacy Rights Effectively Denied

Fourteen states have no provisions, one way or another, for posthumously conceived children, being silent.

Twenty-eight states refer to children born after an intestate's death, but either as conceived before the death and born after (like Manitoba), or as having been "in gestation" at the

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[40] *Ibid.* at 128.

[41] *Ibid.*

[42] Fla. Stat. § 742. 17(4).

[43] *Supra* note 19.

[44] Joseph H. Karlin, ""Daddy, Can You Spare a Dime?": Intestate Heir Rights of Posthumously Conceived Children" 79 Temp. L. Rev. 1317 (2006) contains a survey of American state legislation respecting posthumously conceived children.

time of the death, later born alive and surviving for 120 hours. Such children have intestacy rights. Posthumously conceived children are not mentioned, but are not likely to be included through judicial interpretation of the wording of the statutes.[45]

There are four states[46] which deny rights to posthumously conceived children, in most circumstances. They extend eligibility to children born no later than 10 months after the parent's death, whether conception was by natural or assisted means. This window of opportunity effectively excludes posthumously conceived children by not giving enough time for a, presumably, grieving spouse or common-law partner to decide to pursue posthumous conception and to achieve a resultant live birth only10 months after the death.

(b) Intestacy Rights Granted

One state, Massachusetts, has simply said "posthumous children" are to be treated as living at the date of death of their parent. A court case has interpreted this to mean posthumously conceived children have intestacy rights, but with limitations.[47]

Nine other states have specifically made provision for posthumously conceived children to have intestacy claims, but with varying degrees of detail.

Of these nine states, four[48] have parentage Acts which provide that in order to be deemed a parent of a posthumously conceived child, one must have consented "in a record" to be the parent of the child if there were to be ART after death with that person's gametic material. These states require the spouse of the decedent to have given birth to the child.[49] Three states[50] have the same provision for parentage of posthumously conceived children, but have dropped the requirement that the deceased's spouse give birth to the child. The provisions of these seven states focus on the necessity of consent "in a record", so as to avoid the problem of otherwise ignoring the deceased's reproductive choice through post-mortem use of gametic material. They do not, however, address other policy concerns such as balancing the rights of posthumously conceived children against those of other claimants by setting a time limit on delay of estate distribution or giving them notice of the possibility of posthumous conception in the circumstances.[51]

Louisiana has passed legislation stating that a posthumously conceived child is deemed to be the child of the deceased with all rights "including the capacity to inherit from the

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[45] See *Finley*, *supra* note 8 and *Khabbaz*, *supra* note 10; *cf. Kolacy*, *supra* note 21.

[46] Georgia, Idaho, South Carolina and Virginia.

[47] *Woodward*, *supra* note 23, with accompanying discussion.

[48] Colorado, Texas, Utah and Washington.

[49] This would seem to eliminate posthumously conceived children (born to a surrogate) of a deceased woman.

[50] Delaware, North Dakota and Wyoming.

[51] See Karlin, *supra* note 44 at 1347.

decedent",[52] as if the child had been in existence at the time of the death. Specific authorization for post-mortem use of the deceased's reproductive material must have been given in writing, and the child must be born to the surviving spouse within three years of the deceased's death. This legislation respects the deceased's reproductive choice by mandating written consent, and sets a time limit for delay of distribution of the estate, but does not require notice to interested parties of the possibility of posthumous conception.

California has the most detailed statute[53] expressly granting intestacy rights to posthumously conceived children. The deceased must have left written consent to the posthumous conception, signed and dated. Within four months of the death, written notice of the availability of the deceased's gametic material for the purpose of posthumous conception must be given to the person who has control over the distribution of the estate. Upon receiving such notice, the person in charge must not distribute any of the estate until the time limit set for delay has passed. The posthumously conceived child must be *in utero* within two years of the intestate's death. Failure to provide the required notice within four months of the death frees the distribution, and any posthumously conceived child would, in that case, have no intestacy rights. The statute honours the deceased's reproductive choice and balances the rights of posthumously conceived children against the rights of other heirs, by setting a time limit for delay of administration, and by requiring notice to them of the possibility of posthumous conception.

6. Ontario

The Ontario Law Reform Commission in its report on Human Artificial Reproduction and Related Matters[54] recommended:

> 21(2) A child conceived posthumously with the sperm of the mother's husband or partner
>
> (a) should be entitled to inheritance rights in respect of any undistributed estate once the child is born or is en ventra sa mère, as if the child were conceived while the husband or partner was alive ...[55]

The Commission based its recommendation on the principle of giving inheritance rights to posthumously conceived children so as not to discriminate against them. Application of the general principle, however, was seen as "impracticable, or unacceptably disruptive where the estate has already been distributed according to ... the law of intestate succession .... Distributions made should not be disturbed ... distribution should not be postponed simply because [gametic material] is held in cryopreservation."[56] It may be recalled that in the *Kolacy*

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[52] La. Rev. Stat. Ann § 9:391.1.A., quoted below in Part F 2(c).

[53] Cal. Prob. Code § 249.5; see Appendix A.

[54] Ontario Law Reform Commission, *supra* note 2.

[55] *Ibid.*, Vol. II at 278. The Commission did not, apparently, consider the possibility that there could be a posthumously conceived child born of a deceased woman through surrogacy.

[56] *Ibid.*, Vol. II at 182.

case,[57] the New Jersey court suggested this approach as a possible solution to the problem of allowing posthumously conceived children intestate succession rights where the rights of others were involved; that is, only any as-yet-undistributed portion of an intestacy should be available for them to share when they came into being.

F. DISCUSSION

1. Policy Concerns Regarding Intestate Succession Rights for Posthumously Conceived Children

Leaving *The Intestate Succession Act* untouched would be unwise. Sooner or later the issue raised in this report is likely to arise, and when it does, the matter would have to be decided by a court action in an adversarial forum. The expense of a lawsuit might deter an application on behalf of a posthumously conceived child from being made, and if it did not, there would be uncertainty of outcome in the interpretation of the statute as it now reads.[58] If a claim were successful, the court would still have to decide what limitations to attach to such claims. A court might reject a claim stating itself to be an inappropriate body to decide such a matter with its obvious policy implications.[59] Besides, doing nothing would leave administrators of intestacies in a quandary over when and how to distribute the estate if a posthumously conceived child is a possibility, is in gestation or has been born.

Explicit legislative exclusion of posthumously conceived children would provide certainty and finality in the administration of intestacies. There would be no delay in the distribution of shares to interested parties, and no diminution of those shares. If an estate had not been fully distributed by the time a posthumously conceived child was born, or in gestation, there would be no interference with any further distribution. Exclusion has been found appealing in many other jurisdictions. The court in New Jersey which decided *Khabbaz v. Commissioner, Social Security Administration*[60] said that including posthumously conceived children in intestacies would undermine the orderly distribution and finality of estates. The United Kingdom[61] and the state of Florida[62] have both legislated against including posthumously conceived children in intestacies. Some American states have effectively barred them, by requiring the birth of posthumous children to occur within ten months of the relevant death.[63]

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[57] *Supra* note 21.

[58] See the varying interpretations of similarly worded legislation in the American cases: *Kolacy*, *supra* note 21, *Finley*, *supra* note 8, and *Khabbaz*, *supra* note 10.

[59] The courts in *Finley*, *supra* note 8 and *Khabbaz*, *supra* note 10, declined to take on the role of determining public policy, saying that this must be left to their respective legislatures.

[60] *Supra* note 10.

[61] *Supra* note 32.

[62] *Supra* note 42.

[63] *Supra* note 46.

Also, the Law Reform Commission of New South Wales, Australia, has recommended exclusion so as to avoid complexity and confusion in administration of intestacies.[64]

As compelling as the arguments for administrative convenience, simplicity and efficiency may be, there are several arguments in favour of intestacy rights for posthumously conceived children.

The principle of *The Intestate Succession Act* seems clearly to be that of transmission of wealth from intestates to their families: spouses or common-law partners, and blood (including adopted) relatives. The state has irrebuttably presumed that this scheme is what people would have intended concerning their estates; therefore, to omit posthumously conceived children would run counter to this principle, for they are, after all, blood relatives.[65]

To include posthumously conceived children in intestacies would be in their best interests. Surely the state would wish to protect and expand the rights of children and not to exclude a specific class of children from important inheritance rights enjoyed by others. To exclude them would be to discriminate on the basis of an accident of birth; posthumously conceived children have no control over the way they come into this world.[66] Also, since, virtually by definition, posthumously conceived children will be born into single-parent families, there may be financial need. Intestate inheritance rights could provide substantial practical support. It must be remembered that posthumously conceived children might inherit, through a deceased parent, from intestacies of other family members such as half-siblings or grandparents, thus achieving further financial means.[67] In any event, there seems to be no value in treating posthumously conceived children differently from other family members by denying them expectations in intestacies. They are biologically related to the intestate in exactly the same degree as others who may take shares and ought to have the same status in the intestacy, and in the family.[68]

Finally, it may be argued that it is in the best interests of taxpayers to include posthumously conceived children in *The Intestate Succession Act*. It is better that people should be financially supported by their families than that some of the burden should fall upon the public purse. Posthumously conceived children should be able to look to intestate succession law for support, before seeking it from the state.[69]

The values of inclusion appear to outweigh the value of administrative convenience.

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[64] *Supra* note 38.

[65] *Woodward, supra* note 23.

[66] *Ibid.*

[67] Melissa B. Vegter, "The "ART" of Inheritance: A Proposal for Legislation Requiring Proof of Parental Intent Before Posthumously Conceived Children Can Inherit from a Deceased Parent's Estate" 38 Val. U.L. Rev. 267 (2003), Part III A.

[68] Erica Howard-Potter, "Beyond Our Conception: A Look at Children Born Posthumously Through Reproductive Technology and New York Intestacy Law" 14 Buff. Women's L.J. 23 (2005-2006) at 66.

[69] *Ibid.* at 67-68.

2. Balancing the Interests

(a) The Best Approach

The rights of posthumously conceived children in intestacies would come at the expense of others and, therefore, ought to be carefully balanced and limited. There are important concerns that must be addressed besides the interests of posthumously conceived children: the interests of the other claimants, and the procreative control of the deceased.[70] Also, as a practical matter, those in charge of intestate administration must not be left in doubt about their duties.

The approach of those American states which have adjusted their parentage legislation to include posthumously conceived children[71] is, apparently, the most generous of them. The only policy concern dealt with is that of the deceased's right to control procreation. The deceased is required to have consented "in a record" to be the parent of any child(ren) born through posthumous ART. Nothing is said about how long estate administration is to be delayed pending the possible coming into existence of posthumously conceived children, nor is there any mention of notice being given to interested parties that posthumously conceived children are a possibility in the circumstances.[72]

Clearly, this legislative approach would require judicial interpretation to achieve certainty and would, in the end, be no better than doing nothing at all. It would be left to individuals to spend their own resources in court actions to determine the extent of posthumously conceived children's rights in intestacies, and what estate administrators should be doing in the meantime. As well, it seems inappropriate to expect the courts to fashion a specific regime when the legislature may well be the better forum for policy decisions.[73]

A different approach was suggested by the Ontario Law Reform Commission.[74] Posthumously conceived children would be entitled to a share of whatever had been undistributed in the intestacy up to the date of their birth or gestation. There would be no recall of distributed shares and no freezing of the estate after the death to await the possible appearance of a posthumously conceived child. It seems that such child(ren) would take only the appropriate proportionate share of the remaining estate; that is, no effort would be required to bring them up to parity with those who had already received shares by, for example, awarding them more of what was left at that point.

The Ontario Law Reform Commission model avoids the necessity of setting a time limit for delay of distribution, or of requiring notice to interested parties that posthumous conception is a possibility in the particular situation. On the other hand, it is shabby treatment of posthumously conceived children, awarding them whatever crumbs may happen to be left on the

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[70] *Woodward*, *supra* note 23.

[71] See Part E 5(b), above.

[72] Karlin, *supra* note 44.

[73] *Supra* note 59.

[74] *Supra* note 2.

table when they come into existence, and not a full share by right. Also, distribution of the estate, depending upon who was in control of it, might be inordinately delayed or hastily concluded in consideration of a potential posthumous conception. Finally, no attention is paid to the deceased's wishes concerning post-mortem use of the banked gametic material for purposes of conception.

Neither of the two preceding approaches to legislative inclusion of posthumously conceived children in intestacies is adequate. They do not achieve a reasonable balance of competing interests and the former gives no guidance to estate administrators. The best approach is for the legislation to be as detailed as possible, taking into account the concerns presented in the following section of this report.

(b) The Required Elements

(i) Delay of Distribution

It is beyond question that the legislation must set "a hard cutoff"[75] date before which the estate may not be distributed. Setting that time limit would require some sensitivity. A surviving spouse or common-law partner would need a reasonable, unpressured time to grieve and to make the decision to go ahead with the life-altering plan to parent a posthumously conceived child.[76] As well, ARTs are often not successful at the first attempt (if ever) and time will be needed to conceive.[77]

Louisiana requires the birth to occur within three years of the death,[78] while California mandates only that the child be *in utero* within two years of the death.[79] Due dates may not be exact and some pregnancies last longer than expected and so the "gestational" view seems better than that of demanding birth by a certain date. In either case, delay in administering the intestacy is up to three years, which is likely a good compromise. It gives time for grieving and conception, and does not hold up distribution to other heirs for an inordinate time.

There seems to be no reason to halt the time delay on the occurrence of a birth. It may be that further attempts could be made within the chosen time limit, and all posthumously conceived children born or in gestation by that time should be included in the intestacy.

The onus would be on the users of gametic material to provide proof of birth of posthumously conceived children or of confirmed pregnancy by the deadline, whereupon the

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[75] Greenfield, *supra* note 5.

[76] *Woodward*, *supra* note 23.

[77] The success rate for AI is only about 40% of patients. The success rate for IVF varies from 16% to almost 38%, depending upon the age of the woman: Vegter, *supra* note 67 at 270, n. 19. See also *Stephen v. Commissioner of Social Security*, *supra* note 19, where several unsuccessful attempts at IVF were made before a child was born 3½ years after the father's death.

[78] *Supra* note 52.

[79] *Supra* note 53.

appropriate calculation of shares could be made. Failing the requisite proof, the administrator would then be free to distribute the estate without delaying further.

(ii) Notice to Interested Parties

In order to freeze administration of an intestacy on behalf of potential posthumously conceived children, notice should be required to be given to the person in control of the estate, or if that person is the possible user of the reproductive material, to all interested parties, that the deceased's gametic material is available for the purpose of posthumous conception. If no such notification were required, the situation would be the same as the Ontario Law Reform Commission's recommendation,[80] but with a specified time for the birth to occur or gestation to begin. Surely the administrator could go ahead with impunity until a posthumously conceived child came into existence within the time limit. The child would share in whatever may then be undistributed.[81]

The appropriate time limit for the giving of notice that gametic material is available for posthumous conception ought to be the same as the time limit set out in Manitoba's *Dependants Relief Act* for launching a dependants relief application, which is six months from the date of the grant of administration.[82] During this time, except for paying out creditors, the administrator may not distribute any part of the estate,[83] because the whole of the net estate must be available for payment to those judged in need of relief. Since no distribution of the estate can be made during this six months, it makes no sense to have a shorter notice period for posthumously conceived children.[84] Is six months from the date of the grant sufficient for a grieving spouse or common-law partner to give the notice, because it is merely notice of availability of reproductive material for posthumous use, not of intention to use, bearing in mind that usually a grant occurs several months after death? Probably it is, but out of an abundance of caution a judicial discretion to extend the notice period should be provided. At the end of the six months or judicially extended notice period, if no notice has been provided, the rights of any posthumously conceived children would be barred.

The notice should be in writing.

(iii) Proof of Biologicial Link

The intent of intestate succession law is to transmit property to the presumed objects of the intestate's bounty – the family; apart from spouses or common-law partners, this means

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[80] *Supra* note 2.

[81] Louisiana's statute, *supra* note 52, does not require notice.

[82] C.C.S.M. c. D37, s. 6.

[83] *Gilles v. Althouse*, [1976] 1 S.C.R. 353.

[84] California requires notice of availability of gametic material for posthumous conception to be provided to the person in control of the estate within four months of the death: *supra* note 53.

blood relations. If proof of biological link is not required of the posthumously conceived child, then this aim may not be achieved.[85] Nowadays, proof is, relatively speaking, readily available through DNA testing, which is remarkably reliable and accurate.[86]

California law provides for any interested person to bring an action to determine the parentage of a child.[87] The presumption there would be that the posthumously conceived child is the biological child of the deceased.

Louisiana provides:

> Any heir or legatee of the decedent whose interest in the succession of the decedent will be reduced by the birth of a [posthumously conceived] child ... shall have one year from the birth of such child within which to bring an action to disavow paternity.[88]

These approaches seem less defensible than that of requiring proof of parentage as a condition of eligibility of a posthumously conceived child to have a claim in an intestacy. The expense, delay and unpleasantness of a lawsuit would be avoided, and the proof would not be a hardship for the claimant. Probably, the cost of DNA testing could be charged to the estate if the biological link were proved. Again, since posthumously conceived children may claim through a deceased parent to, say, a grandparent's intestacy, there seems even more reason to require proof of biological link as a condition of eligibility.

(iv) Consent of the Deceased

a. Generally

An important value recognized in *Woodward v. Commissioner of Social Security*[89] is respect for reproductive rights, even of deceased persons; parenthood should not be thrust upon anyone. The court thought that a condition of eligibility for intestate succession of posthumously conceived children should be proof that the deceased consented to the use of gametic material for posthumous conception.

The proof should be clear and convincing; after all, the banking of such material may indicate only a wish to reproduce after some lifetime contingency such as medical treatment potentially causing sterility, not necessarily a wish to reproduce after death.

All of the American jurisdictions which admit posthumously conceived children to inheritance rights require that the deceased consented to posthumous conception. Seven states

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[85] In *Woodward, supra* note 23 at 266, the court spoke of this possibility as a fraud upon the estate.

[86] *Ibid.* at 267.

[87] Cal. Fam. Code § 7630(b) and 7611 (father) and § 7650 (mother).

[88] La. Rev. Stat. Ann. § 9:391.1.B.

[89] *Supra* note 23.

say that the deceased must have consented "in a record"[90] without defining what that might be. Louisiana provides that the decedent must have "specifically authorized in writing" posthumous use of gametic material.[91] California mandates that consent be "in writing ... signed by the decedent and dated".[92]

In Canada, the *Assisted Human Reproduction Act*[93] states, under the heading "Prohibited Activities":

> 8(1) No person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent...to its use for that purpose.
>
> (2) No person shall remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo unless the donor of the material has given written consent ... to its removal for that purpose.
>
> (3) No person shall make use of an *in vitro* embryo for any purpose unless the donor has given written consent ... to its use for that purpose.[94]

Also, by subsection 14(2), any person licensed under the Act to provide assisted human reproduction services must, before accepting a donation of gametic material, obtain written consent from the donor to "... the retention, use, provision to other persons and destruction of the human reproductive material or *in vitro* embryo ...".[95]

Thus, it would seem that a posthumously conceived child could not lawfully be produced without the written consent of the deceased parent. Nonetheless, it would be best to include in *The Intestate Succession Act* a requirement of written consent from the deceased to use of gametic material for posthumous conception, so as to make clear that, even post-mortem, reproductive choice would be respected.

b. Consent to Inheritance Rights

The court in *Woodward v. Commissioner of Social Security* stated a "two-fold consent requirement"; the deceased would have to consent to posthumous conception and to "support"

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[90] Karlin, *supra* note 44 at 1347.

[91] *Supra* note 52.

[92] *Supra* note 53.

[93] S.C. 2004, c. 2.

[94] Severe penalties are enacted in section 60 of the *Assisted Human Reproduction Act*, *ibid.*, for contravention of "Prohibited Activities": fines of up to $500,000 and/or imprisonment for up to ten years.

[95] This section falls under the heading "Privacy and Access to Information" in the *Assisted Human Reproduction Act*, *ibid.*, and contravention would attract penalties under section 61 of fines of up to $250,000 and/or imprisonment for up to five years.

of the resultant child(ren).[96] The point of the second requirement is to make sure that the deceased intended to create post-mortem offspring with inheritance rights. There is a long-standing practice in assisted human reproduction of sperm donation by third parties (usually for compensation).[97] Generally, use is anonymous and confidentiality is assured,[98] but to require proof of consent to "support" children produced from banked gametic material of donors would certainly shield them "from the responsibilities of legal parentage"[99] so as to "encourage the socially beneficial practice of sperm donation".[100] No doubt this portion of the deceased's consent should be included in the intestate succession legislation for the sake of certainty and completeness.[101]

c. Designated User of Banked Gametic Material

Four of the seven American states which have amended their parentage statutes to include posthumously conceived children require them to have been born to the deceased's spouse, while the other three do not have this requirement.[102] Louisiana's Act creating inheritance rights for posthumously conceived children provides that they must have been "born to the surviving spouse".[103] The California legislation requires that the deceased, in the written consent, must designate a person "to control the use of the [gametic] material"[104] without any restriction on whom that person might be.

To require that the user of the banked gametic material be the spouse or common-law partner seems restrictive of the deceased's reproductive choice.

d. The Consent Form

The consent to use of banked reproductive material for the purpose of posthumous conception should be in writing, signed by the deceased and dated. Perhaps there should also be a requirement of two witnesses to the signature, to provide evidence if the competency or

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[96] *Supra* note 23 at 269.

[97] Ontario Law Reform Commission, *supra* note 2 and Garside, *supra* note 2.

[98] *Assisted Human Reproduction Act*, *supra* note 93, "Privacy and Access to Information", ss. 14-19.

[99] *Woodward*, *supra* note 23, n. 23.

[100] *Ibid.*

[101] None of the American statutes providing rights to posthumously conceived children includes this second consent requirement of "support".

[102] Karlin, *supra* note 44 at 1347.

[103] *Supra* note 52.

[104] *Supra* note 53.

voluntariness of the deceased were to be challenged, since inheritance rights are being created. Revocation or alteration of the form should be required to be carried out in the same manner.[105]

The consent form should allow for use of the gametic material by whomever the deceased might designate, either by name or by description, such as "spouse" or "common-law partner", or by anonymous user. The form should also indicate whether the deceased consents to inheritance rights for posthumously conceived children, depending upon the user of the gametic material.

(c) Inheritance from Other Relatives

The case *In re Estate of Kolacy*[106] indicated that posthumously conceived children would inherit from their deceased parents and through their deceased parents from other relatives such as grandparents or "collateral" relatives. The parentage statutes in the American states which include posthumously conceived children do not place limitations on the purposes for which parentage may be determined and, so, rights in intestacies from or through deceased parents may be inferred.[107]

The legislation in Louisiana and California, however, appears to restrict inheritance rights of posthumously conceived children to their parents' estates.

Louisiana:

> ... any child conceived after the death of a decedent, who specifically authorized in writing his surviving spouse to use his gametes, shall be deemed the child of such decedent with all rights, including the capacity to inherit from the decedent, as the child would have had if the child had been in existence at the time of the death of the deceased parent, provided the child was born to the surviving spouse, using the gametes of the decedent, within three years of the death of the decedent.[108]

California:

> For purposes of determining rights to property to be distributed upon the death of a decedent, a child of the decedent conceived and born after the death of the decedent shall be deemed to have been born in the lifetime of the decedent ... if the child or his or her representative proves by clear and convincing evidence that all of the following conditions are satisfied: ...[109]

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[105] California does not require witnessing but revocation or alteration of the consent form must be in writing, signed by the deceased and dated: *ibid.* Manitoba law requires two witnesses for a valid testamentary instrument, *The Wills Act*, C.C.S.M. c. W150, s. 4.

[106] *Supra* note 21.

[107] Karlin, *supra* note 4.

[108] *Supra* note 52.

[109] *Supra* note 53. All of the eligibility requirements set out in the legislation following the part quoted have been noted elsewhere in this report.

There seems to be no principled reason to restrict intestacy rights of posthumously conceived children to the estates of their deceased parents. Posthumously conceived children, being biologically related to other family members should have rights in their intestacies, too.

RECOMMENDATION 1

The Intestate Succession Act ***should be amended to include succession rights for posthumously conceived children to the estates of their deceased parents, and, through their deceased parents, to the estates of other blood relatives, subject to the following conditions:***

- ***posthumously conceived children must be conceived within two years of the grant of administration of the estate;***
- ***notice in writing must be given by the potential user, that gametic material is available for the purpose of posthumous conception, to the administrator of the estate and to persons whose interest in the estate may be affected, within six months of the grant of administration of the estate, subject to a judicial discretion to extend the notice period;***
- ***proof of a biological link between a posthumously conceived child and the deceased parent must be provided;***
- ***there must be consent in writing, signed by the intestate, and dated, to the use of gametic material for the purpose of posthumous conception, and to the creation of inheritance rights for any posthumously conceived child(ren).***

NOTE: The legislation could be more specific about the consent form. It could allow for the intestate to have designated a user of gametic material, named, described, or anonymous, and to have indicated consent to the designate's use of the gametic material for the purpose of posthumous conception, and depending upon the user, to inheritance rights for any posthumously conceived child(ren). Probably, the more general condition that the intestate consented to posthumous conception and creation of inheritance rights for any posthumously conceived child(ren) would be sufficient. The legislation might also require the signing of the consent form to be witnessed.

CHAPTER 3

DEPENDANTS RELIEF FOR POSTHUMOUSLY CONCEIVED CHILDREN

The Dependants Relief Act[1] of Manitoba concerns applications for relief out of an estate of those statutorily defined dependants judicially determined to be in financial need. The Act defines "child" in section 1 as including "a child conceived before and born alive after the parent's death", but does not mention children who are both conceived and born after the parent's death. Posthumously conceived children are, thus, discriminated against in this legislation for reasons based on accident of birth, in the same way as under *The Intestate Succession Act*.[2] Also, if posthumously conceived children are excluded from *The Dependants Relief Act*, they may miss out on needed financial support and become dependent upon the public purse rather than being supported from family resources. If they were included in the Act, costly and perhaps fruitless litigation to determine eligibility would be avoided, at least as to the question of the definition of "child". These are the same points as were made in the report in regard to intestate succession and posthumously conceived children.

RECOMMENDATION 2

The Dependants Relief Act ***should be amended:***

a) to include in the definition of "child" a child conceived and born alive after the parent's death, subject to the following conditions:

- ***posthumously conceived children must be conceived within two years of the grant of probate or administration of the estate;***
- ***notice in writing must be given by the potential user, that gametic material is available for the purpose of posthumous conception to the personal representative of the estate and to persons whose interest in the estate may be affected, within six months of the grant of probate or administration of the estate, subject to a judicial discretion to extend the notice period;***
- ***proof of a biological link between a posthumously conceived child and the deceased parent must be provided;***
- ***there must be consent in writing, signed by the deceased parent, and dated, to the use of gametic material for the purpose of posthumous conception, and to the provision of dependants relief for any posthumously conceived child(ren);***

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[1] C.C.S.M. c. D37.

[2] C.C.S.M. c. I85.

b) to amend section 6 to provide for a limitation period regarding posthumously conceived children requiring that if application is to be made for dependants relief, it must be made within six months following the date of birth.

NOTE: In regard to the final bullet of Recommendation 1, page 24, and Recommendation 2, above, the donor of gametic material must not be allowed to consent only to either inheritance rights or the provision of dependants relief, but must consent to both, or neither.

CHAPTER 4

THE INTESTATE SUCCESSION ACT: SUBSECTIONS 1(3) AND 6(1)

During its consideration of intestate succession rights for posthumously conceived children, the Commission had occasion to consider subsections 1(3) and 6(1) of *The Intestate Succession Act*:[1]

> 1(3) Kindred of the intestate conceived before and born alive after the death of the intestate inherit as if they had been born in the lifetime of the intestate.
>
> ---
>
> 6(1) A person who fails to survive the intestate for 15 days, excluding the day of death of the intestate and of the person, shall be treated as if he or she had predeceased the intestate for purposes of succession under this Act.

The Act provides succession rights to designated successors who are alive at an intestate's death and also to successors who are conceived before and born after an intestate death. Subsection 6(1) imposes a 15 day survival only for successors alive at the intestate's death. Whatever is the purpose of requiring a 15 day survival for successors alive at the intestate's death, the same period of survival following birth should be required of a subsection 1(3) child and of a posthumously conceived child.

RECOMMENDATION 3

Subsection 6(1) of* The Intestate Succession Act *should be amended to require survival for 15 days, excluding the date of birth, for a successor conceived before and born after an intestate and for a posthumously conceived child of an intestate.

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[1] C.C.S.M. c. I85, ss. 6(1), 1(3).

CHAPTER 5

THE INTESTATE SUCCESSION ACT: SUBSECTIONS 4(5) AND (6) AND SECTION 5

Recently, this intestacy was brought to the attention of the Commission: X died, survived by a maternal first cousin and eight paternal first cousins. That is to say, X was not survived by a spouse, any issue, parents, siblings, issue of siblings, grandparents, uncles, or aunts; her closest surviving blood relatives are her nine first cousins. Succession to her estate is governed by *The Intestate Succession Act*,[1] subsection 4(5) and section 5:

> 4(5) If there is no surviving issue, parent or issue of a parent, but the intestate is survived by one or more grandparents or issue of grandparents,
>
> (a) one-half of the estate goes to the paternal grandparents in equal shares or to the survivor of them, but if there is no surviving paternal grandparent, to the issue of the paternal grandparents or either [of] them to be distributed per capita at each generation as provided in section 5; and
> (b) one-half of the estate goes to the maternal grandparents or their issue in the same manner as provided in clause (a);
>
> but if there is only a surviving grandparent or issue of a grandparent on either the paternal or maternal side, the entire estate goes to the kindred on that side in the same manner as provided in clause (a).
>
> 5(1) When a distribution is to be made to the issue of a person, the estate or the part of the estate which is to be so distributed shall be divided into as many shares as there are
>
> (a) surviving successors in the nearest degree of kinship to the intestate which contains any surviving successors; and
> (b) deceased persons in the same degree who left issue surviving the intestate.
>
> 5(2) Each surviving successor in the nearest degree which contains any surviving successor shall receive one share, and the remainder of the intestate estate, if any, is divided in the same manner as if the successors already allocated a share and their issue had predeceased the intestate.

Accordingly, the maternal first cousin is entitled to one-half of X's estate and X's eight paternal first cousins share the other half. Although the nine first cousins are of equal degree of kinship to X they do not share her estate equally, or *per capita* if you will; they share her estate by representation or *per stirpes*, through their respective grandparents. Is this appropriate? Is it likely, if X could be consulted, that this distribution would be her choice rather than an equal sharing by her nine first cousins, assuming she had no preference for her maternal first cousin, a necessary assumption respecting *The Intestate Succession Act*? We think not.

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[1] C.C.S.M. c. I85.

In its Report No. 61, *Intestate Succession* (1985),[2] in ultimately recommending the repeal of *The Devolution of Estates Act*[3] and the enactment of legislation which became *The Intestate Succession Act*, *inter alia*, the Commission considered the method for determining next-of-kin and inheritance by representation. Regarding the former, the Commission recommended that the method of *The Devolution of Estates Act*, by counting degrees of consanguinity, be replaced by the parentelic system, by which, after the spouse and issue, first come parents and their issue, then grandparents and their issue, and finally great-grandparents and their issue. The Commission also said, at page 32:

> The Commission also favours the division of the intestate estate between next-of-kin on the paternal and maternal sides in those cases where the deceased is survived by the more remote "issue of grandparents or great-grandparents". The present law gives the estate in equal shares to the next-of-kin by counting degrees of consanguinity; consequently it will often give the entire estate to next-of-kin on only one side, even if there is next-of-kin on both sides. For example, a maternal aunt in the third degree will take the entire estate even if a paternal cousin of the fourth degree also survives. We prefer ...the estate [to be divided] into two portions so as to provide an equal sharing for the deceased's maternal and paternal kindred.[4]

Thus, the Commission recommended the enactment of subsection 4(5), above.

Regarding inheritance by representation, which was the distribution principle of *The Devolution of Estates Act*, the Commission considered it with distribution "*per capita* at each generation". Pursuant to distribution by representation survivors of the same generation do not necessarily succeed to an equal share of the estate; pursuant to distribution *per capita* at each generation they do. For example, if the survivors are a brother, two sons of a predeceased sister, and a daughter of another predeceased sister, distribution by representation results in the surviving brother succeeding to one-third of the estate, the two children of the one predeceased sister sharing one-third, and the child of the other predeceased sister succeeding to one-third of the estate. Distribution *per capita* at each generation results in the surviving brother succeeding to one-third of the estate and the three nephews and nieces sharing equally the other two thirds. The Commission concluded that "the *per capita* at each generation approach will produce the best, and most logically consistent, result in most survivor situations".[5] Thus the Commission recommended the enactment of section 5, above.

The Commission did not consider specifically the intestate circumstances which recently were brought to its attention. Although in Report No. 61 we recommended the enactment of legislation to end distribution by representation in favour of distribution *per capita* at each generation, inadvertently our recommended legislation, which was enacted, in the situation recently brought to our attention and subsection 4(5), above, provides for a distribution by representation. Identically, subsection 4(6) provides for a distribution by representation when

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[2] Manitoba Law Reform Commission, *Intestate Succession* (Report #61, 1985).

[3] R.S.M. 1987, c. D70, as rep. by S.M. 1989-90, c. 43, s. 12.

[4] *Supra* note 2 at 32.

[5] *Ibid.* at 42.

the survivors in the nearest degree of kinship are issue of paternal and maternal great-grandparents.

RECOMMENDATION 4

The Intestate Succession Act ***should be amended to provide that when the survivors in the nearest degree of kinship are issue of paternal and maternal grandparents or great-grandparents and they are all of the same generation, they should share the estate equally.***

CHAPTER 6

LIST OF RECOMMENDATIONS

1. *The Intestate Succession Act* should be amended to include succession rights for posthumously conceived children to the estates of their deceased parents, and, through their deceased parents, to the estates of other blood relatives, subject to the following conditions:

    - posthumously conceived children must be conceived within two years of the grant of administration of the estate;

    - notice in writing must be given by the potential user, that gametic material is available for the purpose of posthumous conception, to the administrator of the estate and to persons whose interest in the estate may be affected, within six months of the grant of administration of the estate, subject to a judicial discretion to extend the notice period;

    - proof of a biological link between a posthumously conceived child and the deceased parent must be provided;

    - there must be consent in writing, signed by the intestate, and dated, to the use of gametic material for the purpose of posthumous conception, and to the creation of inheritance rights for any posthumously conceived child(ren).

    NOTE: The legislation could be more specific about the consent form. It could allow for the intestate to have designated a user of gametic material, named, described, or anonymous, and to have indicated consent to the designate's use of the gametic material for the purpose of posthumous conception, and depending upon the user, to inheritance rights for any posthumously conceived child(ren). Probably, the more general condition that the intestate consented to posthumous conception and creation of inheritance rights for any posthumously conceived child(ren) would be sufficient. The legislation might also require the signing of the consent form to be witnessed. (p. 24)

2. *The Dependants Relief Act* should be amended:

    a) to include in the definition of "child" a child conceived and born alive after the parent's death, subject to the following conditions:

        - posthumously conceived children must be conceived within two years of the grant of probate or administration of the estate;

- notice in writing must be given by the potential user, that gametic material is available for the purpose of posthumous conception to the personal representative of the estate and to persons whose interest in the estate may be affected, within six months of the grant of probate or administration of the estate, subject to a judicial discretion to extend the notice period;

- proof of a biological link between a posthumously conceived child and the deceased parent must be provided;

- there must be consent in writing, signed by the deceased parent, and dated, to the use of gametic material for the purpose of posthumous conception, and to the provision of dependants relief for any posthumously conceived child(ren);

b) to amend section 6 to provide for a limitation period regarding posthumously conceived children requiring that if application is to be made for dependants relief, it must be made within six months following the date of birth.

NOTE: In regard to the final bullet of Recommendation 1, page 24, and Recommendation 2, page 25, the donor of gametic material must not be allowed to consent only to either inheritance rights or the provision of dependants relief, but must consent to both, or neither. (p. 25)

3. Subsection 6(1) of *The Intestate Succession Act* should be amended to require survival for 15 days, excluding the date of birth, for a successor conceived before and born after an intestate and for a posthumously conceived child of an intestate. (p. 27)

4. *The Intestate Succession Act* should be amended to provide that when the survivors in the nearest degree of kinship are issue of paternal and maternal grandparents or great-grandparents and they are all of the same generation, they should share the estate equally. (p. 30)

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 28th day of November 2008.

"Original Signed by"
Cameron Harvey, President

"Original Signed by"
John C. Irvine, Commissioner

"Original Signed by"
Gerald O. Jewers, Commissioner

"Original Signed by"
Alice R. Krueger, Commissioner

"Original Signed by"
Perry W. Schulman, Commissioner

APPENDIX A

CALIFORNIA PROBATE CODE SECTION 249.5

For purposes of determining rights to property to be distributed upon the death of a decedent, a child of the decedent conceived and born after the death of the decedent shall be deemed to have been born in the lifetime of the decedent, and after the execution of all of the decedent's testamentary instruments, if the child or his or her representative proves by clear and convincing evidence that all of the following conditions are satisfied:

(a) The decedent, in writing, specifies that his or her genetic material shall be used for the posthumous conception of a child of the decedent, subject to the following:

(1) The specification shall be signed by the decedent and dated.

(2) The specification may be revoked or amended only by a writing, signed by the decedent and dated.

(3) A person is designated by the decedent to control the use of the genetic material.

(b) The person designated by the decedent to control the use of the genetic material has given written notice by certified mail, return receipt requested, that the decedent's genetic material was available for the purpose of posthumous conception. The notice shall have been given to a person who has the power to control the distribution of either the decedent's property or death benefits payable by reason of the decedent's death, within four months of the date of issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever event occurs first.

(c) The child was in utero using the decedent's genetic material and was in utero within two years of the date of issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever event occurs first. This subdivision does not apply to a child who shares all of his or her nuclear genes with the person donating the implanted nucleus as a result of the application of somatic nuclear transfer technology commonly known as human cloning.

POSTHUMOUSLY CONCEIVED CHILDREN: INTESTATE SUCCESSION AND DEPENDANTS RELIEF;

THE INTESTATE SUCCESSION ACT: SECTIONS 1(3), 6(1), 4(5), 4(6) AND 5

EXECUTIVE SUMMARY

A. INTRODUCTION

This report considers three matters respecting intestate succession, two being amendments to existing sections of *The Intestate Succession Act* and one being the question whether posthumously conceived children should be eligible to inherit from and through a deceased parent who dies intestate. Also, in regard to posthumously conceived children there is the concomitant issue of dependants relief.

B. POSTHUMOUSLY CONCEIVED CHILDREN: INTESTATE SUCCESSION AND DEPENDANTS RELIEF

The Intestate Succession Act currently provides for inheritance by successors alive at the intestate's death and by survivors who were conceived before but born after the death of the intestate. The definition of "child" in *The Dependants Relief Act* is similar to what is provided for the right of kindred to inherit in *The Intestate Succession Act*. *The Dependants Relief Act* should be amended to include a posthumously conceived child(ren).

Nowadays, conception can occur through assisted reproduction technologies after the death of at least one biological parent by using cryopreserved gametic material. Sooner or later, such a posthumously conceived child will emerge who would be entitled to participate in an intestacy or make application for dependants relief, but for the silence of the Acts. *The Intestate Succession Act* and *The Dependants Relief Act* should be amended to include posthumously conceived children in order to remedy the current discrimination and to avoid costly, perhaps fruitless, litigation.

C. *THE INTESTATE SUCCESSION ACT*: SUBSECTIONS 1(3) AND 6(1)

The Intestate Succession Act should be amended to require of survivors conceived before and born after the death of an intestate and of posthumously conceived children, the 15 day survival which is required of survivors alive at the death of an intestate.

D. *THE INTESTATE SUCCESSION ACT*: SUBSECTIONS 4(5) AND 4(6) AND SECTION 5

The Intestate Succession Act should be amended to provide, when the survivors in the nearest degree of kinship are issue of either grandparents or great-grandparents, and are all of the same generation, that they share the estate equally.

ENFANTS CONÇUS DE FAÇON POSTHUME :
SUCCESSIONS *AB INTESTAT* ET AIDE AUX PERSONNES À CHARGE;

LOI SUR LES SUCCESSIONS AB INTESTAT:
PARAGRAPHES 1(3), 6(1), 4(5) et 4(6) ET ARTICLE 5

SOMMAIRE

A. INTRODUCTION

Le présent rapport porte sur trois questions concernant les successions *ab intestat*, deux d'entre elles visant la modification des articles existants de la *Loi sur les successions ab intestat* et la troisième consistant à savoir si les enfants conçus de façon posthume devraient avoir le droit d'hériter d'un parent décédé *ab intestat*. De plus, en ce qui concerne les enfants conçus de façon posthume, il se pose en même temps la question de l'aide aux personnes à charge.

B. ENFANTS CONÇUS DE FAÇON POSTHUME : SUCCESSIONS *AB INTESTAT* ET AIDE AUX PERSONNES À CHARGE

La *Loi sur les successions ab intestat* prévoit actuellement que peuvent hériter les successeurs qui sont vivants au décès de l'intestat et les survivants conçus avant mais nés après le décès de l'intestat. La définition de l'« enfant », aux termes de la *Loi sur l'aide aux personnes à charge*, est semblable à la disposition sur le droit des parents d'hériter aux termes de la *Loi sur les successions ab intestat*. La *Loi sur l'aide aux personnes à charge* devrait être modifiée afin de comprendre les enfants conçus de façon posthume.

De nos jours, la procréation peut se faire par le biais de techniques de procréation assistée, après le décès d'au moins un parent biologique, si l'on utilise du matériel gamétique cryoconservé. Tôt ou tard, il naîtra un enfant conçu de façon posthume qui aura un droit sur une succession *ab intestat* ou qui pourra réclamer l'aide aux personnes à charge, sauf que les lois sont muettes sur ce point. La *Loi sur les successions ab intestat* et la *Loi sur l'aide aux personnes à charge* devraient être modifiées afin d'inclure les enfants conçus de façon posthume, et ce, pour corriger la discrimination actuelle et éviter des recours coûteux, voire non fondés.

C. *LOI SUR LES SUCCESSIONS AB INTESTAT* : PARAGRAPHES 1(3) ET 6(1)

La *Loi sur les successions ab intestat* devrait être modifiée afin d'imposer que les survivants conçus avant mais nés après le décès de l'intestat, et les enfants conçus de façon posthume, survivent pendant la période de 15 jours qui est exigée pour les survivants qui sont vivants au moment du décès de l'intestat.

D. *LOI SUR LES SUCCESSIONS AB INTESTAT* : PARAGRAPHES 4(5) et 4(6) ET ARTICLE 5

La *Loi sur les successions ab intestat* devrait être modifiée afin qu'il soit prévu que, lorsque les survivants au plus proche degré de parenté sont les descendants, soit des grands-parents, soit des arrière-grands-parents, et qu'ils sont tous de la même génération, ils se partagent la succession à parts égales.